PSC-NAVAL DOCKYARD SDN BHD

v.

KESATUAN PEKERJA-PEKERJA NAVAL DOCKYARD SDN BHD & ANOR

HIGH COURT MALAYA, IPOH
SU GEOK YIAM JC
[ORIGINATING MOTION NO: 25-38-1998]
5 DECEMBER 2001

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Quashing award of Industrial Court - Grounds of Industrial Court's decision - Whether erred in law - Whether acted in excess of its jurisdiction - Section 33(1) Industrial Relations Act 1967*

LABOUR LAW: *Industrial Court - Procedure - Ambiguity or uncertainty in award or collective agreement - Whether application should have been made under s. 33(2) Industrial Relations Act 1967 requiring Form N pursuant to r. 15 Industrial Court Rules 1967*

LABOUR LAW: *Industrial Court - Trade dispute - Industrial Court's interpretation of a phrase in collective agreement to mean terms and conditions which were embodied in an out of date manual - Whether Industrial Court correct - Whether acted in excess of its jurisdiction*

This was the applicant's application for an order of *certiorari* to quash an award of the Industrial Court, *ie*, the 2nd respondent, contending that the Industrial Court had acted outside its jurisdiction and/or without jurisdiction in granting the award. The award was given in respect of an application by the 1st respondent under Form M pursuant to r. 14 of the Industrial Court Rules 1967 ('the Rules') and s. 33(1) of the Industrial Relations Act 1967 ('IRA'), to interpret an article which conferred housing loan benefits to the applicant's employees contained in a collective agreement ('CA') between the 1st respondent and the applicant.

Held:

[1] The union should have invoked s. 33(2) of the IRA which is governed by a different procedure requiring Form N to be used pursuant to r. 15 of the Rules, if it was seeking a variation of the CA by the Industrial Court because of ambiguity or uncertainty in an award or a collective agreement. (p 372 h)

[2] The conditions for the housing loan benefits were stated in the "Manual Prosidur Pinjaman Perumahan Naval Dockyard Sdn. Bhd." ('the said manual'). From a reading of art. 8.2 of the said manual, the employee concerned should present his application for a housing loan to the bank and obtain the bank's approval within one year of the issuance of the manual. The said manual was issued on 1st November 1992. This meant that at the time of the signing of the CA on 11 September 1996 and on the effective date of the CA, on 16 April 1997, the said manual had ceased to be operative through the effluxion of time. (pp 367 e & 374 b)

[2a] The Industrial Court had therefore exceeded its jurisdiction when it interpreted a phrase of the CA to mean the terms and conditions which were embodied in the said manual although those terms and conditions had ceased to operate after 30 October 1993. By doing so, the Industrial Court sought to reactivate the said manual by breathing new life into it. (p 374 g-h)

[3] The chairman of the Industrial Court had resolved factual disputes concerning the knowledge, understanding and intention of both the signatories of the CA at the time of signing the CA without hearing evidence. As a result thereof, the Industrial Court gave a decision which not only had no probative basis but was also unauthorised by s. 33(1) of the IRA. (p 375 c)

[4] Section 33(1) of the IRA does not empower the Industrial Court to fill in gaps or *lacunae* in a collective agreement. The proper course of action to take was for the parties concerned to resort to s. 26(1) of the IRA. Furthermore, careful consideration of the grounds of decision of the Industrial Court in the light of the pleadings of the case revealed that the Industrial Court had exceeded the parameters of its jurisdiction as conferred upon it by s. 33(1) of the Industrial Relations Act 1967. (pp 375 b, 376 f-g & 378 f)

[Application allowed; Industrial Court's award quashed.]

Case(s) referred to:

Amanah Butler (M) Sdn Bhd v. Yike Chee Wah [1997] 2 CLJ 79 ***(refd)***

Federal Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers [1983] 1 CLJ 67; [1983] CLJ (Rep) 150

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia [1996] 4 CLJ 687 ***(foll)***

Kesatuan Pekerja-pekerja Perkayuan v. Syarikat Jengka Sdn Bhd [1997] 2 CLJ 276 ***(dist)***

Malayan Agriculture Producers Association v. National Union of Plantation Workers [1992] 3 CLJ 1336; [1992] 1 CLJ (Rep) 207 ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(foll)***

SB Industries Sdn Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Perusahaan Alat-alat Pengangkutan dan Sekutu [1993] 2 ILR 503 ***(dist)***
Sime Darby Bhd v. Quah Siew Khoon [1999] 5 CLJ 610 ***(refd)***
Sykt Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 ***(foll)***
Trengganu Bus Co Sdn Bhd v. Transport Workers Union [1983] 1 MLJ 393 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 2, 26(1), 33(1), (2), 56
Industrial Court Rules 1967, r. 14
Rules of the High Court 1980, O. 53

For the plaintiff - N Sivabalah; M/s Shearn Delamore & Co
For the defendant - Izham Haron

Reported by Raja Vishnu Sivarajah

JUDGMENT

Su Geok Yiam JC:
This is an application (encl. 5) by the applicant pursuant to O. 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash an award of the Industrial Court, the 2nd respondent, given in respect of an application by the 1st respondent to interpret an article in a collective agreement.

Facts And Background
The 1st respondent is the Kesatuan Pekerja-pekerja Naval Dockyard Sdn Bhd (hereinafter referred to as "the Union"). It had applied in Form M pursuant to r. 14 of the Industrial Court Rules 1967 (hereinafter referred to as "the Rules") and s. 33(1) of the Industrial Relations Act 1967 (hereinafter referred to as "the IRA") to the Industrial Court for the interpretation of "Fasal 4.15 (2) Pinjaman Perumahan" of a collective agreement, cognisance no. 91/97 (hereinafter referred to as "the CA") between the Union and Pihak Majikan Naval Dockyard Sdn Bhd (hereinafter referred to as "NDSB").

NDSB was a company incorporated in 1991 under the laws of Malaysia. At all material times its principal activity has been the repair and maintenance of naval and merchant ships, equipment and systems, fabrication of steel structures and shipbuilding. In furtherance of this principal activity it operates a dockyard in Lumut, Perak Darul Ridzuan, formerly operated by the Royal Malaysian Navy and known as the Royal Malaysian Naval Dockyard which was corporatised in 1991 and fully privatised in or around 11 December 1995. In or around 21 November 1997, NDSB changed its name to PSC-Naval Dockyard Sdn Bhd, the applicant.

The applicant employs approximately 1064 employees. It recognises the Union which represents 769 of the employees for collective bargaining purposes. The applicant has executed the CA with the Union governing terms and conditions of employment for the period 1 January 1996 until 3 December 1998 in respect of the 769 employees. The CA was duly accorded cognisance by the Industrial Court *vide* Cognizance Number 91/97;

"Fasal 4.15 Pinjaman Perumahan" of the CA

"Fasal 4.15 (2) pinjaman perumahan" which appears at p. 36 of the CA confers housing loan benefits on the employees. It provides as follows:

> FASAL 4.15: PINJAMAN PERUMAHAN
>
> (1) …
>
> (2) Bagi anggota RMN Dockyard yang layak semasa dilantik dan belum pernah mendapat pinjaman perumahan boleh memohon pinjaman perumahan **mengikut syarat-syarat yang berkuatkuasa sekarang** tetapi tempoh bayaran balik tidak boleh melebihi persaraan pilihan dan wajib. (emphasis added.)

According to the Union, the phrase "mengikut syarat-syarat yang berkuatkuasa sekarang" (hereinafter referred to as "the said phrase") should be interpreted to mean "bermula dari tarikh perjanjian bersama ditandatangani ataupun apabila mendapat pengiktirafan dari pihak Mahkamah." The Union contended that the conditions for the housing loan benefits are clearly stated in the Manual Prosidur Pinjaman Perumahan Naval Dockyard Sdn Bhd (hereinafter referred to as "the said Manual") which it attached to Form M as an Appendix. The Union further contended that "when they signed the Collective Agreement on 11 September 1996 and taken cognisance by court on 16 April 1997" they understood that the only conditions applicable to the housing loan benefits were those as stated in the said manual. It asked the Industrial Court to accept the Union's interpretation of art. 4.15(2) of the CA.

The said manual was prepared by the Ministry of Finance. It provided for a housing loan scheme whereby the employees who purchased homes pay subsidised interest rate of 4% and the corporatised body would pay 5% interest. It also stipulated other terms and conditions.

In opposition, in its statement-in-reply dated 3 August 1998, NDSB contended that the said phrase should be interpreted to mean "based on the conditions currently in force". Further, irrespective of whether the operative date was the date of the signing of the CA or the effective date of the CA, ie the date the Industrial Court took cognisance of the CA, "no existing conditions on the housing loan scheme (were) in force at the material time". NDSB also denied the allegations contained in the Union's statement of case.

In its statement of case, the Union disagreed with the interpretation of NDSB. It contended that prior to the privatisation of the Naval Dockyard, the said manual provided the guidelines in respect of applications for housing loan. It reiterated that when the CA was signed, the understanding of the Union was that those who had qualified for the housing loan under the said manual but have not taken it are entitled to the housing loan and that was the reason why Fasal 4.15(2) was included in the CA and it was accepted by both the parties. It took the view that NDSB's contention that there were "no existing condition(s) on the housing loan scheme … in force at the material time" as being rather ridiculous and could not and should not be accepted because why should NDSB agree to include an article on "Pinjaman Perumahan" if there are no conditions or guidelines to facilitate the implementation of the article.

The other arguments of the Union are as follows:

(1) since NDSB through art. 4.15 "Pinjaman Perumahan" had provided the housing loan benefit to its qualified staff and since NDSB has contended that there were no existing conditions at the material time it meant that the qualified staff could enjoy the housing loan without any conditions or guidelines;

(2) since the CA is the only document containing the terms and conditions of employment and benefits, the facility provided therein should be enjoyed by all the employees who are covered by the agreement;

(3) since many employees have already enjoyed and benefitted from the housing loan it is only fair that other employees who have qualified and who have not enjoyed this facility be given the same opportunity to do so;

(4) the said manual was incorporated into the CA by virtue of art. 4.15(1) and (2);

(5) without the said manual, the article tended to give a different meaning altogether; and

(6) it is meaningless to have an article in the CA if it could not be implemented.

On 21 September 1998, the Industrial Court, Pulau Pinang heard the reference and arguments by the Union's representative and NDSB's representative.

Decision Of The Industrial Court

On 30 September 1998, Mr. K. Ramakrishnan, the chairman of the Industrial Court, handed down the following interpretation in the form of an award *vide* Award No: 519 of 1998 (hereinafter referred to as "the said award"):

13. *Article 4.15 of the Collective Agreement provided the opportunity for those non-executive employees who have not applied for the housing loan under the manual (CO-1) to apply for same without any conditions attached.* In fact article 4.15 (2) expressly stipulates that employees of Royal Malaysian Naval Dockyard referred in Bahasa Malaysia as "anggota RMN Dockyard" who are eligible and have not applied for housing loan previously could apply for same now. *By including clause 4.15 (2) in the Collective Agreement the Company waives the time limit found in article 8.2 of the manual.*

14. *The Company's contention that the manual and the terms contained therein would be still applicable is acceptable but however clause 4.15(2) found in the Collective Agreement waives the time limit provided in the manual. Moreover the Agreement the Company reached with Bank Rakyat to grant housing loan facilities to the employees* does not stipulate that the loan facilities was only for a period of one year. The agreement *seems to be for a(n) indefinite period* (see CO1 pp. 13 to 16).

15. The panel also does not accept the submission by the Company that the Company and the Union were ignorant and inexperienced when they signed the new Collective Agreement. *It must be noted that the only dispute that arose from the Collective Agreement is the housing loan to the non-executive employees.* There are no other disputes arising from the Collective Agreement. *The fact that the parties have included housing loan for employees of Royal Malaysian Naval Dockyard is clear indication that both parties wanted the employees to benefit from the housing loan. If the Company had decided not to grant housing loan to the employees they certainly would not have included article 4.15 in the Collective Agreement.*

16. In the circumstances *the panel unanimously comes to the conclusion that when the Company signed the Collective Agreement with the Union to give housing loan to the non-executive employees it was the intention of the parties to waive the time limit. In fact the Company had impliedly promised the Union that the interest rate and other terms remain status quo.*

17. The Company's silence in mentioning other term(s) and condition(s) in cl. 4.15 of the agreement would fortify the above findings. (emphasis added.)

The Applicant's Case

Dissatisfied with the said Award, the applicant applied to this court *vide* notice of originating motion (encl. 5) filed on 18 January 1999 pursuant to O. 53 of the Rules of the High Court 1980 (hereinafter referred to as "the RHC") for an order of *certiorari* to quash the said Award with costs on the ground that the Industrial Court had acted outside its jurisdiction and/or without jurisdiction when it:

(1) failed to take into account relevant matters and/or took into consideration irrelevant matters including matters affecting its jurisdiction;

(2) arrived at a decision contrary to the rules of natural justice;

(3) made a precise decision which was unsupported by any rational and/or probative basis in fact;

(4) arrived at a decision which was unsupported by any rational and/or probative basis in fact;

(5) erred in law and exceeded its jurisdiction.

It relied on the affidavit of Kamaruddin bin Ahmad, the executive director of the applicant, affirmed on 6 November 1998 (encl. 2), (hereinafter referred to as "the supporting affidavit") in support of its motion.

In his supporting affidavit, Kamaruddin bin Ahmad has affirmed, *inter alia*, that the Industrial Court in holding that:

(1) Article 4.15 of the CA provided an opportunity for non-executive employees who have not applied for the housing loan to apply for one without any conditions attached;

(2) although the said manual had expired, the terms therein are still applicable because the CA waived the time limit and the applicant's agreement with Bank Rakyat seemed to be for an indefinite period; and

(3) the applicant had impliedly promised the Union that the interest rates and other terms will remain at *status quo*;

had exceeded the true bounds of its authority under s. 33(1) of the IRA because its decision went beyond the narrow question it was asked to interpret, namely, whether "mengikut syarat-syarat yang berkuatkuasa sekarang" meant "bermula dari tarikh perjanjian bersama ditandatangani ataupun apabila mendapat pengiktirafan dari pihak mahkamah".

He further affirmed as follows:

(1) the decision arrived at by the Industrial Court was without jurisdiction because it involved resolving various disputes of facts surrounding the intentions of the parties at the time the CA was executed which was outside the scope of s. 33(1) of the IRA;

(2) these disputes of facts would warrant the matter being resolved as a trade dispute, which may only be referred to the Industrial Court by the Minister of Human Resources after being conciliated upon by the Director General of Industrial Relations;

(3) the decision of the Industrial Court that the said manual was still in force, although it had expired and that the CA waived the time limit in the said manual was so unreasonable and devoid of plausible justification that no reasonable person or body of persons so circumstanced could have arrived at such a decision because there was no probative evidence which would have justified such a conclusion; and

(4) such a conclusion also amounted to a variation of the terms of the CA and the imposition upon the applicant of an obligation which the applicant had never envisaged when it executed the CA thereby rendering the conclusion of the Industrial Court an abuse of the provisions of s. 33(1) of the IRA as it is outside the scope of that subsection.

Issue For The Court's Determination

The main issue is whether in arriving at its decision as set out in the foregoing para. 12 the Industrial Court had exceeded its jurisdiction, namely, by committing an error of law, or by adopting an unfair procedure or by arriving at an unreasonable, illegal or irrational decision. In deciding this issue the court is mindful of its supervisory role over the decision of the Industrial Court which is a court of an inferior tribunal and a creature of statute. In discharging that role this court does not act as an appellate court. This court needs only to concern itself with the propriety of the decision making process, not the decision, unless the decision is one which is illegal, irrational or so unreasonable that no reasonable tribunal similarly circumstanced would have arrived at the decision. (See *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 and *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748.)

In *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia* [1996] 4 CLJ 687, at p. 710, Gopal Sri Ram JCA in delivering the judgment of the Federal Court had this to say:

> In *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union*, the Court of Appeal correctly recognised that *Anisminic* had done away with the distinction between errors of law that go to jurisdiction and errors that do not. We are of the opinion that the following extract from the judgment of the Court of Appeal accurately declares the present state of the law ([1995] 2 CLJ 748 at p. 765):
>
> > An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort

is had to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 CLJ 619) or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunised from judicial review by an ouster clause however widely drafted.

Findings Of The Court

The court is of the view that the Industrial Court had exceeded its jurisdiction on the following grounds:

The provision in the IRA which deals with the power of the Industrial Court to interpret an award or a collective agreement is s. 33(1). That subsection caters only to cases where all that is involved is an interpretation simpliciter of an award or a collective agreement. Section 33 provides as follows:

33. Interpretation and variation of awards and agreements

(1) If any question arises as to the interpretation of any award or collective agreement taken cognizance of by the Court, the Minister may refer the question, or any party bound by the award or agreement may apply, to the Court for a decision on the question.

(2) The Court may, upon the application of any party, by order vary any of the terms of an award or agreement, if it considers it desirable so to do for the purpose solely of removing ambiguity or uncertainty.

(3) The parties bound by the award or agreement shall be afforded a reasonable opportunity of being heard.

The Union must invoke s. 33(2) which is governed by a different procedure requiring Form N to be used pursuant to r. 15 of the Rules if it is seeking a variation of the CA by the Industrial Court because of ambiguity or uncertainty in an award or a collective agreement. (See *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union (supra)* and *Federal Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers* [1983] 1 CLJ 67;

[1983] CLJ (Rep) 150. In *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union (supra),* the Court of Appeal held that the remedy of *certiorari* is available to quash awards of the Industrial Court handed down in the exercise of its interpretative jurisdiction conferred by s. 33(1) of the IRA. It also formally overruled the decision of Hashim Yeop A Sani J (as he then was) in *Trengganu Bus Co Sdn Bhd v. Transport Workers Union* [1983] 1 MLJ 393. In that case the learned judge had decided that "it is not the intention of the (IRA) to allow an applicant to seek the (High Court's) aid to quash an order of the Industrial Court under s. 33 of the (IRA)".

The problem in the instant case has arisen because art. 4.15(2) of the CA which expressly confers housing loan benefits on the non-executive employees of the applicant who are Union members did not spell out the conditions applicable to the housing loan benefits. Instead it provided that the housing loan benefits were to be "mengikut syarat-syarat yang berkuatkuasa sekarang". The Union wanted the Industrial Court to interpret the said phrase to mean two things. The first was that the conditions which are applicable to the housing loan benefits were the conditions which were applicable on the date of the signing of the CA or the date when the Industrial Court took cognisance of the CA. The second was that the conditions which were applicable both on the date of the signing of the CA and the date when the Industrial Court took cognisance of the CA were those conditions as were set out in the said manual. The Union was aware that art. 8.2 of the said manual had since lapsed. Notwithstanding that, the Union asked the Industrial Court to interpret the said phrase to mean "according to the conditions in the Manual Prosidur Pinjaman Perumahan Naval Dockyard Sdn Bhd" based on the reasons already mentioned in the foregoing paras. 6, 9 and 10. I shall not repeat them here.

As stated earlier, the applicant, on the other hand, was emphatic that the said phrase should be interpreted to mean "based on the conditions currently in force" and, further, that irrespective of whether the operative date was the time of the signing of the CA or the effective date of the CA there were no existing conditions for the housing loan benefits because there was no housing loan scheme in force at the material time since the said Manual sought to be relied upon by the Union had lapsed by virtue of art. 8.2 which provided as follows:

> 8. *TARIKH KUATKUASA*
>
> 8.1 …
>
> 8.2 *Manual Prosidur Pinjaman ini dikeluarkan pada 1 November 1992 dan pemohon dikehendaki mengemukakan permohonan dan memperolehi kelulusan daripada pihak bank tidak lewat satu tahun dari tarikh berkenaan.* Sebarang permohonan untuk menikmati kemudahan pinjaman berkenaan selepas tarikh yang ditetapkan tidak akan dilayan oleh pihak NDSB. (emphasis added.)

Before the Industrial Court, the same arguments were put forth by Mr. M. Balakrishnan of M.T.U.C., the representative for the Union and Mr. William Joseph, the representative for the applicant. I shall not repeat them here.

It is clear from a reading of art. 8.2 of the said manual that the employee concerned should present his application for a housing loan to the bank and obtain the bank's approval within one year of the issuance of the said manual. The said manual was issued on 1 November 1992. This meant, therefore, that both at the time of the signing of the CA, namely, on 11 September 1996 and on the effective date of the CA, namely, on 16 April 1997, the said manual had ceased to be operative through the effluxion of time. In other words from 1 November 1993 onwards those non-executive employees of the NDSB who had not applied for and obtained the bank's approval for a housing loan before the cut off date of 30 October 1993 could no longer apply for any housing loan benefits under the said manual since art. 8.2 of the said manual had expired and ceased to have any effect after 30 October 1993.

Before the Industrial Court, Mr. William Joseph, the applicant's representative, and Mr. M. Balakrishnan, the Union's representative, had submitted and I quote the following excerpt from the judgment of the learned Chairman of the Industrial Court in para 12 of his grounds:

> … that he could not understand why the Company and the Union included clause 4.15 (2) pertaining to housing loan in the Collective Agreement. It is his opinion that both parties were inexperienced at the time when they negotiated and executed the Collective Agreement. Mr. Balakrishnan, for the Union submitted that when the new Collective Agreement was signed, both parties, not only knew that the non-executives who have not applied for housing loan before, could apply now, but both knew exactly the entire terms and conditions in the manual. It was with this intention that both parties signed the Collective Agreement.

This court is of the respectful view that the Chairman of the Industrial Court exceeded its jurisdiction when it interpreted the phrase "mengikut syarat-syarat yang berkuatkuasa sekarang" in Fasal 4.15(2) of the CA to mean the terms and conditions which were embodied in the said manual although those terms and conditions had already ceased to operate after 30 October 1993, a good two years and ten months before the CA was signed. By doing so the Industrial Court sought to reactivate the said manual by breathing new life into it when there was a clear dispute of facts between the parties as is clearly borne out in the excerpt quoted above.

This court finds that there are merits in the first, fourth and fifth grounds relied upon by the applicant in its application (encl. 5) for an order of *certiorari* to quash the said award, namely, the Industrial Court had taken into consideration

irrelevant matters, the Industrial Court had arrived at a decision which was unsupported by evidence and by doing so the Industrial Court had erred in law and exceeded its jurisdiction.

Having subjected the grounds of decision of the Industrial Court to an anxious and careful consideration in the light of the pleadings which comprise the reference by the Union in Form M, the applicant's statement-in-reply and the Union's Statement of Case, the notes of evidence, the written submissions of both the applicant and the Union before this court, the relevant provisions of the IRA and the authorities cited by Mr. N. Sivabalah, the learned counsel for the applicant, this court finds that the Industrial Court has exceeded its jurisdiction. The Chairman had resolved factual disputes concerning the knowledge, understanding and intention of both the signatories of the CA at the time of signing the CA without hearing evidence. As a result thereof the Industrial Court gave a decision which not only had no probative basis but was also unauthorised by s. 33(1) of the IRA. In *Malayan Agriculture Producers Association v. National Union of Plantation Workers* [1992] 3 CLJ 1336; [1992] 1 CLJ (Rep) 207, Harun Hashim SCJ in delivering the grounds of decision of the Supreme Court emphasised as follows in respect of a reference by the Minister under s. 33(1) of the IRA:

> A s. 33(1) reference, on the other hand, has to be precise so that on its face, the Industrial Court will know exactly the question it has to answer. *The facts which give rise to the question have to be stated but must not be disputed.* In the process of answering the question, the Industrial Court will have the benefit of hearing the respective views of the parties bound by the award of collective agreement: s. 33(3). *The Industrial Court should decline to exercise its jurisdiction under this section if it is made to determine disputed questions of fact, so as to ensure that trade disputes are not short-circuited to it in the guise of interpretation questions.* (emphasis added.)

Although the facts of that case concerned a reference by a Minister under s. 33(1) of the IRA, the *ratio decidendi* of that case would also apply to a reference by a Union under s. 33(1) of the IRA.

Instead of confining itself to the sole task of construing, objectively, the intention of the parties from the language used by the parties in art. 4.15(2) of the CA it took into account irrelevant considerations and consequently, wrongly ruled that the said Manual became operative by virtue of art. 4.15(2) of the CA. If it had confined itself to the sole task of interpreting the actual words of the said phrase found in art. 4.15(2) of the CA it would have found that first, the conditions applicable were those currently in force meaning the conditions prevailing at the time of the signing of the CA. Secondly, upon looking at art. 8.2 in the said manual which manual had not been incorporated into the CA by the express provisions of the CA and finding that the said

manual had since lapsed it should have proceeded to decide that there were no conditions currently in force or applicable at the time of the signing of the CA. It should have stopped there and declined to proceed further. It should not have taken the following irrelevant matters into consideration:

(1) the disputed fact that by including cl. 4.15 (2) in the CA, NDSB had waived the time limit in art. 8.2 of the said manual;

(2) there are no other disputes arising from the CA;

(3) the disputed fact that when NDSB signed the CA it was the intention of both parties to waive the time limit in art. 8.2 of the said manual; and

(4) the disputed fact that NDSB had impliedly promised the Union that the interest rate and other terms will remain at *status quo*.

I am entirely in agreement with the contention of the applicant that the interpretation given by the Chairman of the Industrial Court that the said manual had been reactivated amounted to a variation of the terms of the CA thereby imposing upon the applicant an obligation which had not been proven conclusively before the Industrial Court had ever been envisaged when it executed the CA. This court rejects the contention of the Union that "Fasal 4.15" with the sub-heading "Pinjaman Perumahan" followed by Fasal 4.15(1) which provides that *"(a)nggota yang sedang menikmati kemudahan pinjaman perumahan akan terus menikmatinya dengan syarat-syarat yang berkuatkuasa sekarang"* (emphasis added) and Fasal 4.15(2) which also provides that *"(b)agi anggota RMN Dockyard yang layak semasa dilantik dan belum pernah mendapat pinjaman perumahan boleh memohon pinjaman perumahan mengikut syarat-syarat yang berkuatkuasa sekarang tetapi tempoh bayaran balik tidak boleh melebihi persaraan pilihan dan wajib"* (emphasis added) would not have been inserted into the CA and having been so inserted would be meaningless if it could not be implemented. Section 33(1) of the IRA does not empower the Industrial Court to fill in gaps or *lacunae* in a collective agreement. The proper course of action to take is for the parties concerned to resort to s. 26(1) of the IRA. The Industrial Court cannot, in exercise of the powers conferred upon it by s. 33(1) of the IRA, incorporate into the CA terms and conditions not reflected in the wording of the provisions in a collective agreement.

The Industrial Court had detracted from the principle as laid down by the Federal Court in *R Ramachandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, at p. 162, paras b to d wherein Mohd Eusoff bin Chin, CJ expounded the principle that:

> It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence hear the parties' arguments and finally pronounce its judgment having strict regards to the issues. It is true that the Industrial Court is not bound by all the technicalities of a Civil Court (s. 30 of the Industrial Relations Act 1967) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider.

The issue before the Federal Court was whether the Industrial Court in deciding that the claimant was dismissed with just cause and excuse had misdirected itself by not considering the allegations of misconduct, in particular, it had failed to determine as a fact whether the termination was as a result of a retrenchment exercise or as a result of the claimant's own misconduct.

The principle as reproduced above had been followed by the Court of Appeal in *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79 and by the High Court in *Sime Darby Bhd v. Quah Siew Khoon* [1999] 5 CLJ 610.

The case of *S.B. Industries Sdn Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Perusahaan Alat-Alat Pengangkutan Dan Sekutu* [1993] 2 ILR 503 is to be distinguished because in that case there was a trade dispute and the Industrial Court correctly decided that facts which constitute a trade dispute must be referred to the court under s. 26 of the IRA and not under s. 33(1) of the IRA.

In the instant case, the facts disclose a "trade dispute" as opposed to a mere difference in interpretation of a provision in a collective agreement. Section 2 of the said Act defines a "trade dispute". The definition reads as follows:

> any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of the employment or the conditions of work of any such workmen.

In my respectful view the observations of Gopal Sri Ram JCA in *Kesatuan Pekerja-pekerja Perkayuan v. Syarikat Jengka Sdn Bhd* [1997] 2 CLJ 276 lend support to the views of this court in the instant case although in that case the Court of Appeal had set aside the High Court's order of *certiorari* to quash an award of the Industrial Court. The facts in that case, however, differ from those here because in construing the relevant provisions of the collective agreement, the Industrial Court was not called upon to incorporate into the

collective agreement a document nowhere mentioned in the collective agreement like the said manual in the instant case. In that case there was a difference of opinion between the employer and the union concerning the construction of arts. 38(95) and 38(96) of the collective agreement entered into between both of them. There were two awards handed down by the Industrial Court. In respect of the first award, it was handed down as a result of a complaint by the Union to the Industrial Court pursuant to s. 56 of the IRA against the respondent for non-compliance with the terms of a collective agreement. Subsequently, the trade union had approached the Industrial Court for an interpretation of its first award, which in turn called for an interpretation of the relevant provisions of the collective agreement. This led to the Industrial Court handing down its second award against the respondent. In arriving at the second award it had to interpret the first award and the relevant provisions of the collective agreement. The respondent succeeded in moving the High Court for an order of *certiorari* to quash the second award. Gopal Sri Ram JCA in allowing the appeal and reinstating the second award of the Industrial Court observed as follows at p. 284:

> Accordingly, in our judgment, *the question that lies at the heart of this appeal is one of pure construction.* What calls for resolution is the question *whether the parties, objectively speaking, intended that the collective agreement should continue in existence until a fresh agreement was negotiated. That intention is, of course, to be ascertained from the language employed by the parties in the collective agreement.* (emphasis added.)

In conclusion, as the Industrial Court in the instant case has exceeded the parameters of its jurisdiction conferred upon it by s. 33(1) of the IRA, I allow the application for an order of *certiorari* with costs. I hereby quash the said award.